

Separation and Accommodation in the Public Schools

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by David McKenzie

The United States finds itself in a paradigm shift regarding religion in the public schools. After several decades of the essentially separationist logic employed by the Warren Court (1953-1969) and the Burger Court (1969-1986), the Rehnquist Court (1986-present) is opting increasingly to accommodate religion. This shift, which is supported by considerable scholarly activity among church-state experts, has been given concrete expression for public schools in directives issued by the Department of Education under both the Clinton and Bush administrations. In this article, I will briefly review the pivotal historic U.S. Supreme Court decisions that embodied a separationist stance as well as the more recent decisions moving in a new direction. I will then recount the position of Yale University Professor of Law Stephen Carter as an indicator of the scholarly drift toward accommodation. This review will be followed by an examination of the crucial government publications on the subject, with a special interest in the sharper tone of the Bush administration directives. The last part of the article will examine flashpoints of the current debate, with reflections on the evolution and creationism issue, the Ten Commandments movement, the Pledge of Allegiance debate, teaching the Bible in public schools, and providing vouchers for sectarian schools. Here attention will be called to practical problems generated by the accommodationist ideal for school officials, focusing on the likelihood that the new approach will encourage religious practices which readily invite constitutional challenges:

The Separationist Tradition

The crucial U.S. Supreme Court decisions supporting a separationist approach relate to prayer and the teaching of creationism in the public schools. The prayer cases are *Engel v. Vitale* (1962), *Abington School*

District v. Schempp (1963), and *Wallace v. Jaffree* (1985). In the *Vitale* case, a generic theistic prayer prescribed by the New York State Board of Regents was struck down as unconstitutional. Justice Black's Opinion of the Court cited Jefferson's and Madison's support for religious freedom and rejection of established churches, as well as the more specific concerns of the founders regarding prayers prescribed by government. The Regents Prayer, he said, was not general enough to command support from all persons "of good will," as the Regents argued; it was instead obviously an expression of religious belief and a religious activity: "There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty."¹ Thus it constituted a violation of the Establishment Clause of the First Amendment as incorporated by the Fourteenth Amendment, and was more generally a breach of the "constitutional wall of separation between church and state."² Although the Regents had defended the prayer activity with the argument that students could be excused upon request and hence participation was not compelled, Justice Black responded: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."³

In the *Schempp* case (1963), the Court considered Bible reading and prayer practices in both Pennsylvania and Maryland. Justice Clark's majority opinion cited a long series of precedents supporting separation of church and state under the First Amendment and found, as in *Vitale*, that special provisions such as allowing students to be excused (and in this case the use of several different versions of the Bible) were irrelevant. Both practices, in his view, directly violated the Establishment Clause because the obviously religious exercises were prescribed by the state. Of particular interest in this case was the development of two prongs of an eventual three-pronged constitutional test to determine Establishment cases:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that, to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.⁴

In *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970), a subsequent case not involving prayer in public schools, the third prong was added to the articulation of the Establishment Clause noted above. The Court ruled that it was desirable to "avoid excessive entanglement" between church and state.⁵ That consideration was then taken up by the Court as the third prong in the rules collectively designated the "Lemon test," from the case *Lemon v. Kurtzman*, 403 U.S. 602 (1971).⁶

In *Wallace v. Jaffree* (1985) the Supreme Court rejected Alabama's "moment of silence" practice allowing one minute at the beginning of the school day for "meditation or voluntary prayer." Such an approach is not so obviously unconstitutional as the prescribed prayer of *Vitale* or the Bible readings and recitation of the Lord's Prayer in *Schempp*, and today many states either permit or prescribe a moment of silence in the public schools. The Court struck down the Alabama practice, however, as primarily advancing religion with no obvious secular purpose. On behalf of the Court, Justice Stevens called attention to the legislative history of the bill creating the program, which revealed that the stated intention of its primary sponsor was to return voluntary student prayer to the schools. As such, by violating the Lemon rules and thus the First Amendment, it constituted an establishment of religion in the schools.⁷

The two U.S. Supreme Court decisions on creationism in the public schools are *Epperson v. Arkansas* (1968) and *Edwards v. Aguillard* (1987). *Epperson* involved an Arkansas law of the late 1920s disallowing the teaching of evolution, rather like the 1925 Tennessee law that occasioned the famous Scopes trial. The Court found in favor of the appellant, Susan Epperson, and the law was overturned. Justice Fortas clearly expressed the obvious Establishment issue in his Opinion of the Court: "The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group."⁸ Two decades later opponents of evolutionary theory in Louisiana attempted a different tactic, writing a law requiring "balanced treatment" of evolution and "creation science" as alternative theories of origin. Despite efforts by the *Edwards v. Aguillard* appellants to distinguish creation science as a legitimate scientific alternative to evolution, the Court rejected the Louisiana law as an unconstitutional effort to establish fundamentalist Christianity in the public schools.⁹ Indeed, the Court found that the ultimate legislative intention of the act was to eliminate evolution from the public school curriculum. In a concurring opinion, Justice Powell disallowed the supposed strictly scientific nature of creation science

by calling attention to the work of the organizations providing material for instruction in the view: "The statements of purpose of the sources of creation science in the United States make clear that their purpose is to promote a religious belief."¹⁰

Those five cases embody the strict-separationist logic of the Warren and Burger Courts. They reflect an understanding of the First Amendment strongly influenced by Madison's "Memorial and Remonstrance against Religious Assessments" and Jefferson's "Bill for Religious Freedom in Virginia," documents crucial to the disestablishment of the Anglican Church in Virginia in the late 1780s. The position was best articulated by Justice Black in the *Everson* case (1947):

The "establishment of religion" clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."¹¹

Accommodation

In both the *Jaffree* and *Edwards* cases, voices friendly to accommodation were sounded in dissenting opinions. In *Jaffree*, Justice Rehnquist asserted that the Court's persistent separationist reading of the founders misrepresents their thought by overlooking their obvious appreciation for the social value of religion. Then in his strongly worded and lengthy dissent in *Edwards*, Justice Scalia argued that the Court had in effect attempted to psychoanalyze the Louisiana legislature, going beneath the creation science proponents' stated intention to achieve balanced treatment of what they saw as two competing scientific theories, with speculation about their "real" religious motivation. Indeed, in his view, the Lemon secular motivation requirement itself is unknowable and should be abandoned.¹²

Three more recent cases indicate the Rehnquist Court's inclination to accommodate religion in the public schools, a move away from the separationist logic of the predecessor Warren and Burger Courts. These cases are *Board of Education of Westside Community Schools v. Mergens* (1990), *Agostini v. Felton* (1997), and *Zelman v. Simmons-Harris* (2002). In the *Mergens* case, the Court upheld the right of a Christian club to

meet after hours at Westside High School in Omaha, Nebraska. The local board of education had denied permission based on separation concerns. On behalf of Westside students, the parents of Bridget Mergens and other students filed suit, arguing that the school's denial violated the Equal Access Act, approved by Congress in 1984. This act requires public secondary schools that maintain a "limited public forum" (i.e., the opportunity for noncurriculum-related student groups such as chess clubs to meet on school premises) to permit as well student groups whose speech within the forum involves "religious, political, philosophical, or other content."¹³ The act carefully specifies that schools cannot sponsor such activities and that faculty and staff cannot "promote, lead, or participate" in the meetings.¹⁴ The Court decided that the Equal Access Act had indeed been violated, and that the act itself was not inconsistent with the Establishment Clause.

Zelman v. Simmons-Harris . . . represents the largest step yet taken by the Court toward accommodating religion.

Justice O'Connor's Opinion of the Court developed a lengthy argument distinguishing a narrow understanding of "curriculum related" implied by the Equal Access Act from the broad construing of the phrase that could have defined all extant clubs at Westside as curriculum related. A narrow interpretation restricts the meaning to include only those clubs, such as the Latin Club for students in the Latin class, whose focus and activity relate "directly" to the curriculum. With that understanding, Westside clearly allowed other noncurriculum-related student groups (a scuba-diving club, for instance) to meet, and therefore the school had to permit the Christian club to meet as well.¹⁵ O'Connor then argued that the Equal Access Act itself is not unconstitutional, noting that in *Widmar v. Vincent* (1981), the Court had ruled that the Lemon test does not bar participation of campus religious organizations in university public forums.¹⁶ She maintained further that denying religious groups such an opportunity would constitute an unconstitutional preference for non-religious over religious speech in a public forum, a position as much at odds with the Lemon test as preference for religion.

Then, in a crucial and controversial move, Justice O'Connor argued that the *Widmar* understanding should apply to high schools as well. "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."¹⁷ In a concurrence, however, Justice Marshall expressed concern that the Court overlooked important differences between the university setting of *Widmar* and the

high school setting of *Mergens*. Marshal thought that because clubs in the latter context function according to the school's mission statement "as a means of developing citizenship" and because, in contrast to the university setting in the Westside case, there was only one advocacy club—the Christian group filing suit—it was difficult to avoid the impression that the school was endorsing a particular religious practice.¹⁸ He cautioned that the school had to take steps to distance itself from the work of the club. "Westside thus must do more than merely prohibit faculty members from actively participating in the Christian Club's meetings. It must fully disassociate itself from the Club's religious speech and avoid appearing to sponsor or endorse the Club's goals."¹⁹

In *Agostini v. Felton*, the next case that demonstrated the Rehnquist Court's accommodationist tendencies, the Court directly reversed its earlier ruling in *Aguilar v. Felton* (1983) that prohibited New York City's program of sending public school teachers into parochial schools to provide remedial education to disadvantaged children. Justice O'Connor, again writing for the majority, relied primarily on the decision in *Zobrest v. Catalina Foothills School District* (1993), where the Court held that assigning a sign-language interpreter for a deaf student in a Tucson, Arizona, parochial high school did not violate the Establishment Clause. Justice O'Connor pointed out that the *Zobrest* decision had undercut the *Aguilar* assumption that the mere presence of a public employee on private school property implies the intent to inculcate religion in the students.²⁰ In the absence of any evidence to the contrary, it should be assumed that a sign-language interpreter, for instance, will dutifully carry out the responsibilities of her profession in accord with its own standard of ethics.²¹ Furthermore, *Zobrest* also calls into question the assumption that such a situation "creates an impermissible 'symbolic link' between government and religion."²²

In addition, relying on the *Witters v. Washington Department of Services for the Blind* (1986) decision, Justice O'Connor pointed out that the Court had also rejected its earlier view that no state funds can be applied directly to the educational function of a private school. In *Witters*, the Court found that a blind student could pay for a Christian college education by using a state vocational tuition grant provided to all qualified students. The crucial proviso for this decision was that the funds were received by the private school as a result of individual choices, not at the direction of the state.²³ Here, remedial education was provided for eligible students whether they chose to attend public or private schools. Hence, there was no constitutional difference in the two cases.²⁴

Thus, the basis for the *Aguilar* decision was effectively rejected, and New York's program survived the Establishment challenge. Throughout

the opinion, Justice O'Connor focused on the second prong of the Lemon test, consistently articulating it in terms of advancement of religion through indoctrination under state control. This concern expressed her more general focus on an "endorsement" test as the best expression of Establishment concerns, a focus clearly indicated in her concurring opinion in *Capitol Square Review & Advisory Board v. Pinette* (1995). In that case, the Court allowed the Ku Klux Klan to place an unadorned cross on the statehouse plaza in Columbus, Ohio, an area designated by state law as a forum for discussion of public questions and for public activities. For Justice O'Connor, the basic consideration in approval was that an informed, reasonable observer would not see the symbol as an endorsement of a religious belief by the state.²⁵

It is interesting that Justice Scalia's Court opinion in the same case generated still another way to articulate the second Lemon prong. Using the determinations pertaining to private speech in a public forum in *Mergens* (discussed above), he developed what might be seen as a more objective way of checking whether religion has been advanced: the *per se* test, as it has come to be called. According to this approach, there are basically two determinations to make respecting Establishment challenges: (1) whether a public forum has been instituted by the state with procedures for access to it that are neutral in regard to religious belief, and (2) whether the speech (the club in *Mergens*, or the cross in *Pinette*) is genuinely private. If both determinations can be demonstrated, then the challenge fails even if incidental advantages accrue to religion as a result.²⁶ Both Justice O'Connor and Justice Souter, rejecting the *per se* test, insisted on greater attention to the details of each situation and the way in which reasonable observers might interpret the expression. Souter further warned of possible abuse by public institutions that establish a public forum with neutral means of access included but with the intention of giving advantage to a particular religion, knowing full well who will use the forum.²⁷

In *Zelman v. Simmons-Harris* (2002), a 5-4 vote of the Court rejected a challenge to Ohio's Pilot Scholarship Program. The decision, representing a significant victory for the Bush administration and proponents of voucher programs generally, establishes a legal precedent that will protect additional programs designed along similar lines from attack on Establishment grounds. It also represents the largest step yet taken by the Court toward accommodating religion.

It is important to note the details of the Pilot Scholarship Program. In 1995 a federal district court, confronted with the Cleveland City School District's persistent standing as one of the weakest in the country, placed

the entire district under state control. In response, the state legislature enacted the scholarship program, providing financial assistance to families of children in any school district under a federal mandate. (The Cleveland district was the only one in Ohio under such a mandate.) In addition to tutorial assistance, the program provides tuition assistance for families who enroll their children in private schools located within the district or in participating public schools in geographically adjacent districts. Because no public school from an adjacent district has chosen to participate thus far, the real choice relates to private schools. In this regard, children from low-income families receive priority, and participating private schools are required to cap tuition for these children at \$2,500 per year. The program provides tuition assistance of up to \$2,250 per child (with a co-pay capped at \$250) for specified low-income families and up to \$1,875 per child for families with a higher income. Families who exercise the latter option may be required to contribute a considerably higher co-pay. In the 1999-2000 school year, there were fifty-six participating private schools and forty-six, or 82 percent, had a religious affiliation. Ninety-six percent of the more than 3,700 students who opted for a private school that year attended a school with a religious affiliation.²⁸ The number of slots allocated for tuition assistance grew to more than 5,500 for the 2002-2003 school year.²⁹

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Chief Justice Rehnquist wrote the Opinion of the Court. He appealed to both the *Zobrest* and *Witters* cases discussed above as well as to *Mueller v. Allen* (1983). That case upheld a Minnesota law allowing an individual income tax deduction up to \$700 for educational expenses, including private tuition, with Rehnquist arguing that the Minnesota law satisfied all three prongs of the Lemon test. The law had the obvious secular purpose of facilitating education generally; there was little concern regarding entanglement; and the effect of the policy did not significantly aid religious causes. Of particular interest are Rehnquist's arguments minimizing concerns over the issue of effect: 1) the deduction was available to all parents of schoolchildren in Minnesota, and 2) any benefits to private parochial schools came indirectly through the choices of individuals, not the state.³⁰ Rehnquist concluded in *Zelman*:

Mueller, Witters, and Zobrest thus make clear that where a government aid program is neutral with respect to religion, and pro-

vides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.³¹

In a strongly worded dissent, Justice Souter argued that the *Zelman* case went far beyond the precedents discussed above and contradicted the holding of *Everson* more than fifty years before: Public funds cannot be used for religious instruction. In his view, the difference between the Ohio Pilot Scholarship Program and the programs approved in precedent decisions was a matter of category, not degree. The Court had approved lending secular textbooks for use in private schools, transportation for private school students, and various public services related to private school students with special needs. But in *Zelman*, Souter said, the state's allocation of funds was not specifically directed to the nonreligious functions of schools with a religious affiliation: "The money will thus pay for eligible students' instruction not only in secular subjects, but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension."³² He maintained also that the majority's neutrality and choice arguments overlook obvious facts. The program's support for private school tuition, Souter said, was hardly neutral given the percentage of participating religious private schools, and parents hardly had a choice, given the paucity of slots available in schools with no religious affiliation.³³

The three cases discussed in this section reveal a Rehnquist Court that is taking a much more accommodationist stance toward religion than the Warren and Burger Courts took. The principles of neutrality, choice, and public forum/private speech, as well as the articulation of the second Lemon prong in terms of endorsement or the *per se* test, have transformed the separationist stance of the earlier Courts. The Court is divided, with Justice O'Connor representing a crucial swing vote and Justice Souter the strongest voice for the lingering separationist view, but with the decisions noted above a reasonable expectation for further cases is an outcome favorable to accommodation. The theoretical question such a Court faces now is implicit in Justice Souter's concern, namely, whether

accommodation will inadvertently serve to favor the majority religion, in this case Christianity, in American culture.

Stephen Carter

30 Paralleling the U.S. Supreme Court's shift to accommodation is a large body of theoretical scholarship representing a similar shift. In the mid-twentieth century, the work of strong separationists such as Leo Pfeffer, a constitutional scholar, prolific writer, and influential attorney for the American Jewish Congress, dominated the academic discussion. The separationist ideal was further articulated by the work of John Rawls, whose books *A Theory of Justice* and *Political Liberalism* carved out a sphere of public reason that excluded religious discourse as ultimately irrelevant to liberal democracy. In the latter part of the century, however, other, more moderate voices have come to dominate the academic discussion. The best known of these voices is that of Stephen Carter.

In *The Culture of Disbelief* (1994), Carter called attention to the disenfranchisement of religion in public life in the United States, a development that overlooks the important role religion has played in the politics of African-Americans. His basic argument is stated through an analogy. If religious conservatives today should not be allowed to use theological arguments to support their positions on issues such as abortion, then we should say as well that Martin Luther King, Jr., and other civil rights activists should not have used theological arguments to support their views publicly. Both the abortion argument and the racial-equality arguments are grounded in theology for religious individuals. Current conservative religious arguments, then, are no more out of place in a liberal democracy than was the civil rights rhetoric of King, quoting freely from the Bible and appealing to the love ethic of Christ. Though Carter's view is subject to challenge, it does make an interesting point: namely, that there is something odd about the effort to dismiss the religious voice from public life altogether, especially in the United States.³⁴

In a more recent work, *God's Name in Vain: The Wrongs and Rights of Religion in Politics* (2000), Carter develops a somewhat more nuanced thesis. On one side, he argues that the religious voice must be incorporated into political debate, but on the other side he warns that religious individuals and organizations should avoid entanglement in political activities, especially electoral politics; he prefers the prophetic tradition in religion, with the prophet standing outside the established order and pronouncing the judgment of God. Religion, as such, must be heard in public life. It is a force that influences the thought of most Americans, particularly African-Americans, and it represents a way of thinking that is

more comprehensive and profound than ordinary political discourse. The religious voice, if prophetic, is transcendent in nature. Says Carter, "When we try to shut the religious voices out of our debates, we close our eyes and ears to radical possibilities that might transform us."³⁵ When religious leaders get deeply involved in politics, however, they encounter the need to compromise for electoral success.

God's Name in Vain makes a credible argument on both points, but it is vague in terms of the intersection of prophetic influence and political process. Carter wants religious input into public reason, but it seems limited to sermons, political stump speeches, pamphlets, and Christian broadcasting. The strongest sense of "public reason" relates to the actual deliberation of a bill in Congress, the justification for a decision by the Supreme Court, or the rationale for action by the executive office. Carter's book does not reveal what role religious arguments might play in this more important sense of "public" life. Because he disdains the necessity of translating religious arguments before allowing them into public discourse, he appears to inadvertently eliminate them from the most important corridors of governmental activity. One could hardly imagine, for instance, that a U.S. Supreme Court justice would appeal to the transcendent authority of God as revealed in the Bible to justify his or her legal argument on the constitutionality of abortion, or that an American president would invoke biblical authority to justify attacking an Islamic republic because it is an enemy of the chosen people of Israel.

Why would an accommodationist position not inadvertently favor the establishment of that commitment, say, through decisions favoring parochial and evangelical schools?

Carter's most straightforward endorsement of accommodation came in a *Christian Century* article, "Beyond Neutrality." The "wall of separation" is an impossibility, in his view: "Religion, by focusing the attention of the believer on the idea of transcendent truth, necessarily changes the person the believer is; which in turn changes the way the believer interacts with the world; which in turn changes political outcomes."³⁶ Furthermore, he says, a survey of court decisions under the model of neutrality reveals that "what we are bold to call neutrality means in practice that big religions win and small religions lose."³⁷ His favorite examples in this regard come from the often-futile efforts of Native Americans to preserve their sacred burial places through court appeal and from the apparent immunity to court challenge enjoyed by Christian denominations of social prominence and influence.³⁸ Given such assumptions regarding the impossibility of separation and the disenfranchisement of

religious minorities on the neutrality model, Carter argues for accommodation on behalf of genuine diversity in society: "The accommodationist believes in religion as something that actually changes the way people are; nurturing religion, then, also nurtures a plurality of communities, communities that assign to existence meanings different from those of the dominant culture."³⁹

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This argument for accommodation is especially interesting because it seems to have both religious and political bases. It is motivated primarily by Carter's awareness of the impact that religious belief can have on individuals and his desire not to allow the state to belittle or marginalize the sincere believer through legislative and judicial decisions. At the same time, however, Carter's argument is motivated also by his firm belief that the state benefits by including the diverse religious voices within it. Indeed, the quote above indicates a religious liberty conviction as the source for both of these concerns. In Carter's view, the better way to preserve religious liberty is through accommodation rather than neutrality.

Carter may be right, but his solution is precarious in respect to religious liberty. He obviously values religious diversity, but in the United States there are well-defined majoritarian religious postures. As endless polls have shown, most Americans believe in God; the vast majority still identify with the Christian faith; the largest Christian group by far is the Roman Catholic Church; and the most vocal public participants among Protestants over the past two decades have been conservative evangelicals. Suppose, then, that Catholics and conservative evangelicals discover similar theological commitments, as they have respecting abortion. Why would an accommodationist position not inadvertently favor the establishment of that commitment, say, through decisions favoring parochial and evangelical schools? Might the approach of preserving religious liberty through accommodation unintentionally disenfranchise religious minorities—most ironically the mainstream Protestant liberal voice? An even greater concern is the fate of those who hold atheist and agnostic positions regarding religion, and the growing presence in the United States of Buddhist, Hindu, and Muslim populations. Such groups would presumably be disadvantaged by accommodation and protected by neutrality.

Government Guidelines

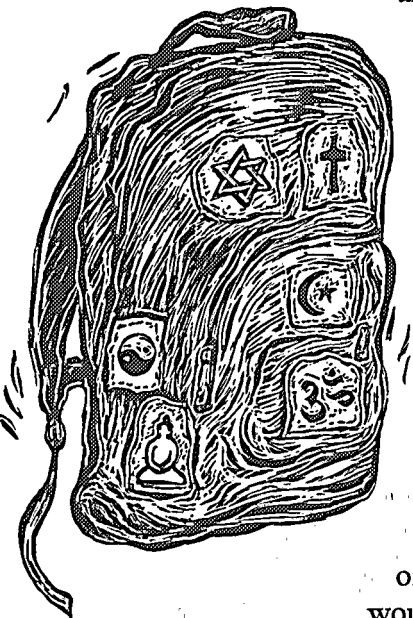
The Clinton administration was actually friendlier to religion than is often portrayed. Not only did the administration support the Restoration of Religious Freedom Act (RFRA) in 1993, an act designed to reinstitute "compelling interest" as the crucial consideration when the government impos-

es burdens on free exercise of religion (later ruled unconstitutional by the Supreme Court in *Flores v. City of Boerne* [1997]), but it also produced two documents on religion in the schools. In 1995 President Clinton issued the first document, entitled "Memorandum on Religious Expression in Public Schools." Its basic point was that the First Amendment permits "a greater degree of religious expression in public schools than many Americans may now understand." Clinton stressed several points arising from the Supreme Court's drift toward accommodation of religion: not only is "purely private religious speech by students" protected in the public schools but, subject to rules of order, students have the right to read from scripture, say grace before meals, and engage in group prayer and religious discussion during the school day. The latter includes "attempts to persuade their peers about religious topics" or even to "distribute religious literature to their school-mates," just as they might do regarding political issues.

Drawing on the Equal Access Act and the *Mergens* decision, the president noted as well the right of students to organize religious clubs and activities such as "see you at the flagpole" during noninstructional time to the same extent that other noncurriculum-related organizations and activities are allowed at the schools. He warned school officials that their stance must be completely neutral regarding such religious activities, but pointed out that religion can be taught in the public schools, including classes in the Bible as literature and comparative religions, so long as advocacy is not involved. Clinton noted the acceptability, arising from a long-standing tradition supported by the *Zorach* (1952) decision, of release-time policies allowing students to be dismissed for off-

campus religious instruction, and—of particular interest to religious conservatives—made clear that students have the right to express their religious beliefs in homework, artwork, and other assignments "free of discrimination based on the religious content of their submissions." Their work is to be assessed on the same objective canons used for other work in school classes.

The president's memorandum noted as well students' right to be excused from lessons that are "objectionable" on religious grounds. Relying on RFRA, he indicated that schools would need to provide a "compelling inter-



est" to refuse an excuse if lessons "substantially burden" students' free exercise of religion. He noted also the right of students to "display religious messages" on their clothing just as the school allows other messages, and, again relying on RFRA, he pointed out that schools generally cannot prohibit the wearing of special religious attire such as yarmulkes and head scarves. Finally, he picked up on the character-education movement with a reference to the "active role" schools can play in teaching "civic values and virtue."⁴⁰

In May 1998, Secretary of Education William Riley issued the Clinton administration's second set of guidelines on religious expression in public schools, identical to the first with the exception of modifications entailed by the Supreme Court's rejection of RFRA.

[G]iven that there are several versions of the Ten Commandments, which should be used?

In February 2003, Bush administration Secretary of Education Rod Paige issued the most recent federal memorandum on religious expression under the title "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools." The document, heavily annotated with references to numerous court decisions, reflects the content of the administration's No Child Left Behind Act (2001). It begins with a stern warning: In order to receive federal funds originally authorized by the Elementary and Secondary Education Act of 1965, local educational agencies must certify annually in writing to their states that they have no policy "that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools." That stricture is followed by an "Overview of Governing Constitutional Principles" reflecting the current accommodationist posture of the Rehnquist Court. The role of the government in preventing an establishment of religion is acknowledged, but the document's emphasis throughout is on government's role of protecting private religious expression in the educational public forum. The government is constitutionally required, the document notes, to preserve "neutrality" regarding private speech in a school setting, but it must not "discriminate" or communicate "hostility" against student prayer or religious speech. Application of the principles includes—and in several cases goes beyond—the accommodations of the Clinton administration documents. Besides religious clubs, students may now organize "prayer groups," which will have the same access to school facilities and school promotion of their meetings given to other groups. During instructional time, requests for excusal based on religious motivation must be accorded the same treatment as nonreligious requests. The document specifically men-

tions excusing Muslim students to fulfill religious obligations during Ramadan. Relying directly on the *per se* test discussed earlier, the document attempts to articulate an approach that will allow prayer at student assemblies, graduation exercises, and before extracurricular events. Although it is unclear how such an approach might be carried out in fact, the document mentions the possibility of protecting the private speech, presumably including prayer, of "student speakers" for these events if they are selected by using "genuinely neutral, evenhanded criteria" and exercise "primary control" over the content of their speech.⁴¹ For the first time, these guidelines indicate as well that teachers can meet with their colleagues for prayer or Bible study before school or during the lunch period, as long as they are not acting in their "official capacities" as representatives of the state.⁴²

Flashpoints

Endless disputes rage on church-state issues related to public school education. Based on the drift toward accommodation described above, the following "flashpoints" have arisen.

Evolution and Creationism

An enormous gap exists between the professional scientific communities and the American public on this topic. Most scientists teaching in colleges and universities in the United States are evolutionists, as are the professional associations representing their work, such as the National Academy of Sciences. At the same time, polls of the American public show that almost half believe in biblical creationism.⁴³ The problem is immediate. Many of the citizens who support public schools with their tax dollars oppose teaching evolutionary theory in the classroom. Yet the professional authority for the discipline of biology as it is taught in the high school classroom consists of scientists and their professional associations committed to evolution.

Local school boards and state legislatures have tried various tactics to offset the authority of evolution. In some contexts, disclaimers stating that evolution is only a "theory" and not a fact have been attached to textbooks, though scientists have responded that the understanding of what constitutes a scientific theory implied in the disclaimers is horribly confused. The U.S. Supreme Court affirmed an appeals court ruling that such disclaimers are unconstitutional. Balanced-treatment proposals are routinely introduced despite the clear ruling of *Aguillard* (discussed above) that they will not withstand an Establishment challenge. The greatest recent success of creationists occurred when the Kansas State School

Board voted in 1999 to allow local school boards to decide whether they wanted to teach creationism, evolution, or neither. The decision was overturned by the board in 2001, however, after three supporters of the new approach were voted out of office.⁴⁴

Creationists' future efforts will likely involve "intelligent design" theory, a variant of creationism. In its most attractive versions intelligent design supports various findings of the majoritarian scientific community—an old universe, speciation, and the evolutionary emergence of *homo sapiens*—but it also argues that the extraordinary mathematics implicit in evolution requires a creator to account for its complexity. By accepting much of contemporary evolutionary theory, arguing only that it is incomplete, this view of creationism has more inherent scientific credibility than older forms. Proponents of intelligent design will likely have some success introducing it into religion, philosophy, or even social science classes in public schools, but it is doubtful that many biology classes will accommodate the theory. Biology, a natural science, requires natural causes for natural effects, even if its view of reality is limited. Professional academics will likely argue that creationism in the form of intelligent design is simply irrelevant to biology and will confuse students about the meaning of scientific inquiry if included.

The Ten Commandments

In *Stone v. Graham* (1980), the Supreme Court ruled that Kentucky's requirement of placing plaques containing the Ten Commandments in every public schoolroom, at private expense, violated the Establishment Clause. The Court, calling attention to the first prong of the Lemon test, found that the "preeminent purpose" for this project is "plainly religious in nature."⁴⁵ Despite this precedent case, and inspired by the Court's recent accommodationist swing as well as the government guidelines on religious expression, conservative Christian organizations are currently engaged in a "Ten Commandments Movement" designed to place the commandments in public buildings everywhere, including public schools.

Problems abound with this project. In the first place, given that there are several versions of the Ten Commandments, which should be used? In the second place, the actual text of the commandments in any version is confusing in the modern context. When students read that the Sabbath should be observed, for instance, will a theological lesson on the Christian replacement of Saturday with Sunday as the "Lord's Day" be required? When students read that "maidservants" and "manservants" are restricted from working on that day, will the textual reference to slaves be required for clarity? And if so, will students need to be informed that the scriptural

text from which their moral guidance is being taken allows slavery, in the commandments themselves? When students read that they should make no graven image, of anything anywhere, will we need to present an aesthetics lesson on sculpture and find some means to justify it in light of the obvious condemnation in the text?⁴⁶ In the third place, although the Decalogue contains admirable moral rules that might constitute a secular reason for posting them in public locations, the first four commandments are directly religious in intent and formulation. How will students of atheist, polytheistic, or nontheistic families feel when urged daily to worship one God? The enthusiasm of the commandment supporters, who are increasingly vocal, is directly related to the ideals of accommodation, but the idea seems misconceived.

The Pledge of Allegiance

In June 2002 a three-judge panel of the Ninth Circuit Court of Appeals ruled the expression "under God" in the Pledge of Allegiance a violation of the Establishment Clause in that it clearly identifies the United States as a monotheistic nation. Congress reacted immediately by condemning the decision, as did President Bush and most American religious leaders. The U.S. Attorney General has indicated that he will appeal to the Supreme Court, and the Ninth Circuit Court has put its decision on hold until the appeals process is exhausted.⁴⁷ Although many Americans believe that the expression "under God" has always been part of the pledge, the phrase dates only from 1954. Congress, urged by the Eisenhower administration, added it to distinguish the United States from the officially atheistic Soviet Union.⁴⁸ It is difficult to argue that the presence of "under God" in the pledge is not primarily intended to advance religion, even to prefer some religions, namely Christianity, Judaism, and Islam, over others that are not strictly monotheistic. Unless the current Supreme Court decides to discard the Lemon test altogether (something it has indicated little interest in doing) and to reject its long-standing commitment to bar public practices that endorse religion over irreligion and some religions over others; or unless it argues that the expression somehow has primarily a secular and not a religious meaning; or unless it decides to make purely a political decision to forestall the rage that will be unleashed otherwise—the Court will be forced to side with the Ninth Circuit.

If the Ninth Circuit ruling is accepted as the law of the land, there will likely be considerable confusion about using the pledge in public schools as administrators allow, or perhaps promote, protest maneuvers similar to those carried out after court restrictions on prayer in school, at graduation, and before football games. Such activity, it might be added, is not likely to

address the rights of students who are atheists or those who hold non-theistic faiths, nor will it affirm the role of the United States as a secular, representative democracy.

Bible Courses

Despite the general belief that the *Schempp* decision "eliminated the Bible from the public schools," Justice Clark's Court opinion clearly articulated that such is not the case:

It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.⁴⁹

In accord with this statement, today there is considerable interest in restoring the Bible to the public school curriculum. In certain respects, such efforts are noncontroversial. For instance, objective instruction in American history courses may and should include references to the prominence of religious beliefs and motivations in the colonial period. And survey courses on American literature should as well include references to biblical images embedded in their assigned novels, short stories, and poetry. But problems arise when schools offer courses on the Bible itself. Here the rule of thumb is that it is constitutionally permissible to teach about religion, or in this case the Bible, but not to endorse any interpretation of religious or biblical claims. A course in the Bible will need to be objective, inclusive, balanced, neutral, and academic in nature. It cannot be devotional or doctrinaire. The difficulty is immediately obvious in the description. How might the Bible be taught in this way in the public schools?

It is difficult to argue that the presence of "under God" in the pledge is not primarily intended to advance religion, even to prefer some religions . . . over others that are not strictly monotheistic.

Here help is available in a widely distributed set of guidelines, "The Bible and Public Schools," a joint publishing venture of the National Bible Association and the First Amendment Center. This document has been endorsed by most major stakeholder organizations, including such divergent groups as the American Jewish Congress and the Christian Legal Society. Its nondoctrinaire approach to studying the Bible in the public schools will acquaint students with different translations of the biblical text and teach different theories of interpretation rather than endorsing or

rejecting any particular one. The latter concern implies that an instructor may neither affirm nor deny biblical inerrancy, for instance, in dealing with the text. The document encourages schools to develop elective rather than required courses, and within the literature rather than the history curriculum. (The problem with the latter option is the complexity of distinguishing biblical events attested in objective historical study and more problematical events, such as the Resurrection of Christ, that are important as expressions of faith.) The document clearly encourages "academic" study of the Bible in high school courses similar to those found in college, university, and many seminary curricula, and it also encourages hiring individuals with the proper training to deliver the courses in the public schools.⁵⁰

Despite the progress made, however, teaching the Bible in the public schools seems likely to produce a storm of passion and litigation. Many Florida public school districts, for instance, have offered Bible classes for several years. In January 2000, the separationist-oriented group People for the American Way offered a report, "The Good Book Taught Wrong," which challenged the Bible courses in fourteen different Florida districts. "The Good Book" argues that such courses flagrantly violated the Establishment Clause by presenting the entire Bible as factual history and teaching conservative Christian theological concepts such as "the fall of man"; "Old Testament" (rather than "Hebrew Bible"); and the "prophecy" of the coming of the "Messiah" fulfilled in the life of Christ. After the report was published, the state department of education issued new guidelines instructing Florida school districts to implement Bible teaching strictly in accord with federal government guidelines concerning objectivity.⁵¹

Vouchers for Sectarian Schools

Even before the *Zelman* decision in 2002, several states had attempted to establish voucher programs providing public funds for private school education. In some cases, such as a California initiative submitted to voters in November 2000, the programs were rejected by ballot. In other cases, such as a Florida initiative signed into law in June 1999, the programs have been found unconstitutional, usually by state courts. Since the *Zelman* decision, however, and generally with support from the Republican party and the Bush administration, enthusiasm for vouchers has increased rapidly and generated a host of proposals modeled on the Ohio program.

As the Cleveland experience indicates, sectarian schools are most likely to benefit from vouchers. Hence, separationist organizations such as People for the American Way and Americans United for Separation of Church and State vigorously oppose voucher programs. Additionally, the

National Education Association and other teacher unions nationwide contend that vouchers siphon crucial funds from public education to support private schools. Besides support from conservative political figures and organizations, the programs are strongly endorsed by the Roman Catholic Church and conservative-evangelical Protestant churches, whose schools are, of course, the primary beneficiaries of the redirected public funds.

Even with U.S. Supreme Court approval, an immediate obstacle for voucher proposals is that most state constitutions specifically prohibit the use of public funds for support of church-related schools. The state rules derive from the "Blaine Amendment," which narrowly failed to obtain Congressional passage in 1876. The proposed amendment read:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State, for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money raised, or lands so devoted be divided between religious sects or denominations.⁵²

In order to implement a voucher program similar to the approach approved in *Zelman*, state legal codes containing some version of the Blaine Amendment will obviously have to eliminate it. This process will generate a complex state-by-state battle, the outcome of which will likely vary in accord with local politics and the church-state commitments of local judges.

The larger issue will be whether states can afford to reallocate the amount of money required to support voucher programs. The cost of the Cleveland program is growing rapidly, but the number of students actually helped is still fairly small. Any statewide programs that unlink vouchers from the state evaluation of "failing schools" would prove enormously expensive and represent a fundamental shift away from our nation's long-held endorsement of public education as the means of preserving democratic ideals.

More directly relevant to church-state concerns, the crucial legal consideration in *Zelman* was that public funds go to private schools indirectly, as a result of the choices of parents who want a better education for their children. Yet as Justice Souter has pointed out and as noted earlier, the practical "choices" of such parents are essentially dictated by the structure of the voucher programs. Most of the public funds used for private education through such programs will go to parochial schools.

Conclusion

This paper has traced the U.S. Supreme Court's modulation from a separationist to an accommodationist stance on church-state cases, supported by the conservative academic scholarship represented herein by the work of Stephen Carter and increasingly expressed in Education Department guidelines. The "flashpoints" in the last section represent the focal points of the divisive and rancorous debate generated by accommodationist logic. Theoretically, accommodation protects private religious speech in public forums and using public funds for private education when parental choices rather than government agencies direct the monies allocated to private schools. Yet in the effort to accommodate religion, the unintended result seems to be advancement of Roman Catholic and conservative Protestant churches—a direct violation of the second prong of the Lemon test and hence of the Establishment Clause. In practice, accommodation justifies religious expression in the public schools in terms of religious clubs, Bible study, teaching the Bible, prayer meetings, "see you at the pole" sessions, witnessing, and religious projects as homework activities. The result, however, will almost inevitably be increased confusion for school administrators, who now must draw the fine line between protected and prohibited prayer; who must allow student and faculty Bible study groups while prohibiting the devotional reading of the Bible as a school function; and who must face the pressure of religious factions to teach the Bible as they interpret it while honoring the constitutional restriction to a nonsectarian, academic study of religion. For many decades, and with the assistance of the U.S. Supreme Court, the ideal of American public education pointed toward a secular approach fully separated from religious interests. Just when the ideal seemed finally to be realized, along came Chief Justice Rehnquist, Professor Stephen Carter, President George W. Bush, and the accommodation infatuation.

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Notes

1. *Engel v. Vitale*, 370 U.S. 421 (1962), at 424.
2. *Ibid.*, at 425.
3. *Ibid.*, at 430.
4. *Abington School District v. Schempp*, 374 U.S. 203 (1963), at 222.
5. *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970), at 674.
6. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), at 612.
7. *Wallace v. Jaffree*, 472 U.S. 38 (1985), at 57.

8. *Epperson v. Arkansas*, 393 U.S. 97 (1968), at 103.
9. *Edwards v. Aguillard*, 482 U.S. 578 (1987), at 594.
10. *Ibid.*, at 604.
11. *Everson v. Board of Education*, 330 U.S. 1 (1947), at 15-16.
12. *Wallace v. Jaffree*, at 91-114; and *Edwards v. Aguillard*, at 610-640.
13. 20 U.S.C. Section 4071 (a) (1984).
14. *Ibid.*, 4072 (2). See also *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), at 253.
15. *Ibid.*, at 245-247.
16. *Ibid.*, at 248. See also *Widmar v. Vincent*, 454 U.S. 263 (1981), at 270-275.
17. *Board of Education of Westside Community Schools v. Mergens*, at 250.
18. *Ibid.*, at 267.
19. *Ibid.*, at 270.
20. *Agostini v. Felton*, 521 U.S. 203 (1997), at 224. See also Justice Rehnquist's Court opinion in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), at 12-13.
21. *Agostini v. Felton*, at 224; and *Zobrest v. Catalina Foothills School District*, at 12-13.
22. *Ibid.*
23. *Agostini v. Felton*, at 226. See also Justice Marshall's Court opinion in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), at 487.
24. *Agostini v. Felton*, at 228.
25. *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), at 772-783.
26. *Ibid.*, at 763. In his concurring opinion, Justice Souter provides the clearest statement of the test (at 784), though he ultimately rejects it.
27. *Ibid.*, at 792.
28. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), at 643-647.
29. Caroline Hendre, "Applications for Cleveland Vouchers Soar after High Court Ruling," *Education Week* 22 (September 4, 2002): 34.
30. *Mueller v. Allen*, 463 U.S. 388 (1983), at 398-399. See also *Zelman v. Simmons-Harris*, at 649-650.
31. *Zelman v. Simmons-Harris*, at 652.
32. *Ibid.*, at 687.
33. *Ibid.*, at 695-707.
34. Stephen Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Anchor Books, 1994). The abortion-civil rights analogy can be found in a variety of places in the text, most notably pp. 48-50, 63-64, and 227-229. I have argued in another context that Carter's argument overlooks the crucial difference between the theological pro-life position on abortion and the theological ideal of racial justice, which is that the latter is easily translatable into secular terms, whereas the former depends primarily on revelatory authority. See my article "Stephen Carter, the Christian Coalition, and the Civil Rights Analogy," *Journal of Church and State* 38 (Spring 1996): 297-320.
35. Stephen Carter, *God's Name in Vain: The Wrongs and Rights of Religion in Politics* (New York: Basic Books, 2000), 108.
36. Stephen Carter, "Beyond Neutrality," *Christian Century* 117 (October 11, 2000): 997.
37. *Ibid.*, 996.
38. *Ibid.*
39. *Ibid.*, 997.
40. Administration of William J. Clinton, "Memorandum on Religious Expression in

Public Schools," *Federal Register* 60 (12 July 1995): 1083-1085, microfiche.

41. *Federal Register* 68, no. 40 (28 February 2003): 9645-9648, microfiche. The guidelines for constitutionally protected prayer at assemblies, graduations, and sporting events recommend a practice that not even the accommodationist Rehnquist Court has found a way to carry out. In its decision in *Santa Fe Independent School District v. Doe* (2000), for instance, the Court turned down a program involving student-initiated and student-led prayer before football games. Santa Fe High School had exercised great precaution to honor guidelines similar to those of the document at hand. A student vote was taken on whether to have prayer before the games, then another vote to select the individual who would say the prayer. Still, the program was rejected essentially because of the role played by the school in setting it up. See *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), at 302 ("These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events"). Another point in the decision was that the student selected was chosen by majority vote, a means of disenfranchising minorities. One scholar has suggested that the only way to clear this hurdle is to have a "random selection" from students who have volunteered, in effect, a student-initiated lottery! See Jonathan Frels, "Simplifying Establishment Clause Jurisprudence in Student-Selected Prayer Cases through the Use of Public Forum Principles," *Review of Litigation* 20 (Winter 2001): 267-269.

42. *Federal Register* 68, no. 40 (28 February 2003): 9645-9648, microfiche.

43. See Working Group on Teaching Evolution, *Teaching about Evolution and the Nature of Science* (Washington, D.C.: National Academy of Sciences, 1998); and Eugenia Scott, "Not (Just) in Kansas Anymore," *Science* 288 (5467) (May 5, 2000): 813-814.

44. "Evolution Returns to Kansas Curriculum," *Curriculum Administrator* 37 (4) (April 2001): 13.

45. *Stone v. Graham*, 449 U.S. 39 (1980), at 41.

46. "Posting the Ten Commandments in Public Schools," <www.religioustolerance.org>.

47. "Appeals Court Sticks to 'Under God' Ruling," *Christian Century* 120 (6) (March 22, 2003): 14.

48. Peter Schuck, "The Pledge on the Edge," *American Lawyer* 24 (9) (September 2002): 65; and Barbara Dority, "Under God Divides the Indivisible," *Humanist* 62 (5) (September/October 2002): 6.

49. *Abington School District v. Schempp*, 374 U.S. 203 (1963), at 225.

50. The document is available on-line at <<http://www.teachaboutthebible.org>>.

51. Michael Gerson, "Bible Study Ruling Is No Miraculous Answer," *U.S. News & World Report* 124, Issue 5 (February 9, 1998): 5. See also "Florida Issues New Guidelines for Using the Bible in Public Schools," First Amendment Center (<<http://www.freedomforum.org>>).

52. Taken from the *Congressional Record*, 44th Congress, 1st Session, 14 December 1875.

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